

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 SONNY B. SOUTHERLAND, SR., ET AL,
5 PLAINTIFFS

6 versus

99 CV 3329 (BMC)

7 TIMOTHY WOO,

8 DEFENDANT.

U.S. Courthouse
Brooklyn, New York

9 -----x
10 June 12, 2013

11 TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL

12 Before THE HONORABLE BRIAN COGAN,

13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES

15
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Proceedings recorded by mechanical stenography. Transcript
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LISA SCHMID, CCR, RMR

1 (Time noted: 10:40)

2 THE CLERK: Southerland, Sr., et al versus Timothy
3 Woo, Docket Number 99 CV 3329.

4 Counsel, please state your appearances, starting
5 with the plaintiff.

6 MR. O'NEILL: Good morning, Your Honor. Michael
7 O'Neill for the Southerland children.

8 MR. KING: God morning, Your Honor. Brian King on
9 behalf of Sonny Southerland, Sr.

10 MS. SILVERBERG: Good morning, Your Honor. Janice
11 Casey Silverberg on behalf of the defendant, Woo.

12 My colleague had an emergency just now and had to go
13 to the car.

14 THE COURT: That's why you're here?

15 (Mr. Bowe entered the courtroom.)

16 MR. BOWE: Pardon me, Your Honor. I was dealing
17 with someone using my American Express card in Sweden.

18 THE COURT: Here's my thinking overnight on where we
19 stand. We have had now two notes from the jury that they're
20 deadlocked. I've given them a modified *Allen* charge. If that
21 doesn't work and if we get another deadlocked note from the
22 jury, what I am inclined to do is to give them the special
23 interrogatories and see if they can answer those. They, of
24 course, do not have those yet. They only have the general
25 verdict form.

1 My thinking on it is this. First, if they were to
2 answer the questions accepting the plaintiffs' version of the
3 facts, then that would not only I think eliminate the
4 qualified immunity defense, but it might also require a
5 directed verdict in favor of plaintiffs, because if those
6 questions are all answered favorably to plaintiffs, I'm not
7 sure that there's an argument that there was not a
8 constitutional violation.

9 On the other hand, if the questions are answered
10 favorably to defendant, then I think there's a strong argument
11 that qualified immunity applies regardless of whether there
12 was a constitutional violation, although I recognize there
13 could be an argument about that.

14 I think no one could be prejudiced by giving them
15 the special interrogatories if we receive another deadlocked
16 note, because everybody knew that -- particularly, the
17 plaintiffs knew -- that those questions would have to be
18 answered at some point and so the plaintiffs presumably tried
19 their case to get those questions answered in the way that was
20 favorable to them.

21 And I think that it would give us the opportunity to
22 salvage something from this. Obviously, their answers would
23 have to be unanimous. They might run into the same problem
24 they've got now. But it's entirely possible that what's going
25 on is not that they're having a problem determining what the

1 facts are, but applying the determination of the facts to the
2 law. And I think by giving them the special verdict form, the
3 interrogatories, that would let us know if the problem is they
4 can't decide which witnesses to believe or they can't decide
5 how to apply the law once they have decided which witnesses to
6 believe, and I think it might obviate the need for another
7 trial. At the very least, it would give us the ability to
8 argue about whether there needs to be another trial, whereas
9 we know there will need to be one if I simply discharge them
10 as deadlocked.

11 So that's my first thought for the morning. What
12 are the parties' feelings before that -- before I ask that
13 question let me ask this. I take it, although I'm not even
14 sure it's relevant anymore, there has been no agreement to a
15 five-juror verdict, right?

16 MR. O'NEILL: That's correct.

17 MR. BOWE: Yes.

18 MR. KING: Your Honor, I think both Mr. Woo and the
19 plaintiffs -- the children plaintiffs have already agreed to
20 it in the docket.

21 THE COURT: The docket does reflect agreement to
22 less than a unanimous verdict. It does say that. That's
23 different than a five-member --

24 Mr. O'Neill, you don't know what you filed.

25 Both Mr. Woo and the plaintiff children filed their

1 proposed verdict forms under an ECF designation that says --
2 that was entitled, "Consent to Verdict by Less than a
3 Unanimous Jury."

4 MR. O'NEILL: Right.

5 THE COURT: Both of you filed that. I don't think
6 you know you filed that. I treated it as an error, but it's
7 not our current problem anyway, even if you had consented to
8 less than a unanimous jury. The problem is, we're losing two
9 jurors tomorrow.

10 MR. O'NEILL: Not so much an error as there's no ECF
11 designation for the proposed verdict sheet.

12 THE COURT: Yes.

13 MR. O'NEILL: So that's the closest thing.

14 THE COURT: That's why I didn't make an issue of it.
15 I figured that's what it was.

16 MR. KING: Well, there is one for less than 12.
17 There's a way to enter it for a jury of less than 12, but
18 again, the Court's -- I take the Court's position that -- it
19 doesn't matter anyway. I just want to clarify -- that the
20 actual entry they use, it's called -- it says, "Jury of Less
21 than Six Members," and so that doesn't make a reference to
22 whether it be unanimous or not. Less than six members, it's
23 my presumption that has to be unanimous even if it's less than
24 six members. So that's based on the jury questions and it's
25 based on the federal rules.

1 THE COURT: Is anyone willing to have a unanimous
2 five-member jury?

3 MR. BOWE: No, Your Honor.

4 THE COURT: Okay. So that answers that.

5 All right. So let's have an answer to my question,
6 what you think about if they give us another deadlocked note,
7 giving them the special interrogatories and seeing if they can
8 answer those?

9 At this time, I'll start with the defendant.

10 MR. BOWE: We would oppose that, Your Honor. The
11 special interrogatories were crafted with -- well, I mean, we
12 know what the intention was to give the special
13 interrogatories after a verdict. I think to give the special
14 interrogatories to them now, after they've indicated they're
15 deadlocked is just going to confuse them. I think the risk of
16 confusion is significant.

17 THE COURT: The questions are pretty clear and
18 straightforward. They're hard to get confused by them. I
19 think I would simply say to the jury, we're going to try
20 another approach, see if you can unanimously answer these
21 questions. But you're opposed to it?

22 MR. BOWE: I understand, Your Honor. The
23 opposition -- yes. But it's not just the concern that the
24 jury's going to be -- I mean, they're -- obviously, they're
25 going to be confused, perhaps not by any one specific

1 question, but by the process.

2 The prejudice I think is -- the possible prejudice
3 is the fact that we drafted those, crafted them and thought
4 about them in the context of a jury verdict on the claims
5 first. We perhaps might have gone at that differently if we
6 had talked about them or considered them as possibly being
7 used instead of a verdict sheet on the actual claims.

8 THE COURT: Well, these aren't the ones you want,
9 anyway. You wanted this tiered approach, where first, they
10 answer what the fact was and then you wanted them asked
11 whether it was reasonable for Mr. Woo to believe that the fact
12 was otherwise than what they have just answered. So whatever
13 you thought you were crafting at the beginning, that's not
14 what you ended up, anyway. I'm not really seeing the
15 prejudice here.

16 Mr. O'Neill?

17 MR. O'NEILL: Yes, Your Honor.

18 The children would also oppose it, and our view of
19 the prejudice is maybe related, but a little bit different.

20 And the way I understand qualified immunity works is
21 that the defendant submits the questions that it wants
22 answered to make its argument for qualified immunity.
23 Plaintiff doesn't submit any questions. If there's a verdict,
24 and there are not questions that address an issue, then the
25 plaintiff gets those facts construed in a light most favorable

1 to plaintiff.

2 Absent the verdict, I don't see how we get that
3 presumption. And so these questions do not reflect anything
4 that we've asked the jury to consider. These are really
5 things that the defendant wants the jury to consider, so that
6 the Court can make a determination of qualified immunity.

7 Furthermore, I don't see that it could guide the
8 Court on the Rule 50, because a Rule 50 really is sufficiency
9 of evidence, and the jury's determination of disputed facts in
10 a non-verdict setting, I just don't see how they could
11 possibly be used by the Court on a Rule 50 motion.

12 So -- and then the last part is, is that we have the
13 same issues with respect to time. The jury comes out at 12 or
14 one or two and says they're deadlocked, and now they're given
15 a whole new set of questions and they've got two or three or
16 four hours and somebody's got to catch an airplane and people
17 are tired and at odds with each other -- it just seems to me
18 to be a recipe for a big compromise here, and it could
19 prejudice the plaintiffs. It could prejudice the defendants.
20 But I think it is an issue as to the integrity of the process.
21 So that's my objection.

22 THE COURT: All right. I will tell you, I don't --
23 I disagree with your view that it's the defendant's questions.
24 It's not the defendant's questions. It's the Court's
25 questions.

1 And indeed, I think it's quite clear that under Rule
2 42(b), if I had wanted to structure the trial this way from
3 the outset, I can separate -- subject to an abuse of
4 discretion standard -- but I can separate any issues out that
5 I want the jury to determine first, because I think it would
6 be helpful to the resolution of the case.

7 So I think if no one had said anything, I could have
8 said, we're going to try these narrow facts first and get
9 nothing from this jury other than the answer to what happened
10 in the preparation of the petition for the Order of Seizure
11 and the seizure of the children themselves. I think that's
12 squarely within Rule 42(b), and since I could have done it
13 before the trial, the only question becomes whether anyone
14 gets prejudiced by me doing it during this stage of the
15 proceedings.

16 Now, Mr. Woo's lawyers have said, we would have
17 drafted them differently, but I really must reject that
18 because they're ultimately the Court's questions and this is
19 how I would draft them in any event, and everyone knew what
20 they were at the beginning of the trial. So I don't think
21 there's any reason not to try it.

22 Mr. King?

23 MR. O'NEILL: Well, I think if the Court had
24 followed the alternate procedure -- and I don't express any
25 particular view on it, although I don't necessarily dispute

1 it, we would have tried the case differently and we would have
2 made a different argument.

3 THE COURT: How is that possible? You knew these
4 questions had to be answered in your favor. It wouldn't do
5 you any good to have them check, yes, there were three
6 constitutional torts on page one, but all of the facts came
7 out in Mr. Woo's favor, so then I then applied qualified
8 immunity.

9 MR. O'NEILL: But there's a difference between
10 having a deadlocked jury answer those questions and having a
11 jury that's already found for the plaintiffs answering those
12 questions.

13 THE COURT: There is.

14 MR. O'NEILL: And there's also the idea that we do
15 have this presumption. So, you know, everything is riding on
16 those questions now if you submit them to the jury. It really
17 wasn't that way in the course of the trial.

18 THE COURT: I kind of think it was. It was riding
19 on two things: The general verdict and the answer to those
20 questions. Now, it would be riding only on the answer to
21 those questions.

22 All right. Mr. King?

23 MR. KING: All right. So, yes, I would object, too.
24 I would incorporate all the arguments made by Defendant Woo.
25 I would incorporate all the arguments, word-for-word, made by

1 the plaintiff children.

2 And I would say a correction, the -- this Court and
3 the Second Circuit both found that on the basis of those
4 facts, even assuming they were true, that would not support a
5 finding of objective reasonableness. That was stated in my
6 Rule 50 motion, our motion before trial and which I renewed at
7 the close of evidence.

8 So I think that the Court is mistaken if it believes
9 that there's any grounds to find objective reasonableness on
10 the basis of those facts alone. As the Second Circuit found
11 and this Court found, additional facts would be required.

12 But there's one other reason that kind of trumps
13 them all and it goes to what Your Honor said about abuse of
14 discretion. The reason that Your Honor cannot do the very
15 thing that Your Honor has proposed is because Rule 49
16 explicitly prohibits it. Rule 49(b) says explicitly you have
17 to give a general verdict with the special interrogatories.
18 You cannot give them separate. The jury has to find both.

19 And so, I'd -- again, I incorporate all those
20 arguments and that's what I offer, in addition the fact that
21 the Court does not have the authority to go and give a special
22 interrogatory in lieu of a general verdict. Thank you.

23 THE COURT: Okay. Well, I'll continue to think
24 about it, and we'll see what we hear next from the jury.

25 The only other suggestion I have is that I wonder if

1 there is any benefit for you all to go see Judge Bloom and
2 have a further settlement discussion. My reason for saying
3 that is this. I think from the children's perspective, they
4 have seen how the process works. They have had their day in
5 court. They have seen what I believe was an outstanding
6 performance by their lawyer, both in closing and in the case
7 generally, and they've also seen that they just can't get a
8 jury to find in their favor, at least thus far.

9 And from Mr. Woo's perspective, I think it works the
10 other way. Mr. Woo has also seen tremendous legal effort on
11 the part of the lawyers and Mr. Woo's lawyers are faced with
12 having to try this case again.

13 I am not going to ask you to tell me whether you
14 want to go see Judge Bloom. I've checked with her and she is
15 free until two. And I think you ought to talk amongst
16 yourselves and if you agree that there might be some benefit
17 to trying again, then by all means, just go to her chambers.
18 Let us know that's where you've gone, and we'll contact you if
19 we get any more notes from the jury. So I'll just leave you
20 with that thought and you can do with it what you think best.

21 All right. We will stand by and see what the jury
22 does next.

23 MR. O'NEILL: Thank you, Your Honor.

24 (Recess.)

25 (Time noted: 1:35 p.m.)

1 THE CLERK: All rise.

2 THE COURT: Be seated, please.

3 All right. We have two notes from the jury, which
4 we've marked as 7 and 8. The seventh, I'm not going read to
5 you in the entirety because the jury disregarded -- well, let
6 me just say, they gave me a count-by-count breakdown, but the
7 first part of the note says, "We cannot reach a unanimous vote
8 on questions one, two, three." They then give me a breakdown
9 which shows that's not entirely true, and then they conclude
10 by saying, "We cannot go forward."

11 Now, what this note leads me to believe is that they
12 can reach a verdict on one or more but not all of the three
13 counts and also, that they're pretty well deadlocked. That is
14 confirmed by Court Exhibit 8, the next note we got, which is
15 not even addressed to me. It's addressed to Ms. Clarke, and
16 it has crossed out, "A number of jurors do not understand the
17 legal terms, change vote every time the question is read."

18 So -- I'm sure the parties would love to know what
19 the breakdown is, but of course, I can't tell you that. So
20 the question is, what would you all like to do? I think it's
21 Mr. King's turn to go first.

22 MR. KING: Your Honor, I would defer to Mr. O'Neill.

23 THE COURT: Okay.

24 MR. O'NEILL: Thank you.

25 (Pause in proceedings.)

1 MR. O'NEILL: I would move for a mistrial, Your
2 Honor.

3 THE COURT: Okay.
4 Defendant?

5 MR. BOWE: (Shakes head negatively.)

6 Your Honor, other than to say that we would not --
7 we would oppose a partial verdict, I don't -- I don't know how
8 to respond --

9 THE COURT: Okay. All right.

10 MR. BOWE: -- except to say with respect to question
11 8, if there is a way to try to gain some clarity from the
12 jurors when they say that they don't understand the legal
13 questions. I mean, that might be helpful. Of course, that's
14 not going to help us with question 7, anyway.

15 THE COURT: You know, this is -- it's a note
16 addressed to Ms. Clarke. It's not even addressed to the
17 Court. I view it as an expression of frustration with some
18 number of jurors.

19 I am going to bring them back in and tell them
20 again, urge them again to try to reach a unanimous vote on all
21 three counts. But if they cannot, if they can reach a
22 unanimous verdict on one or more counts, then they should let
23 us know that and send out the verdict sheet filled out as to
24 only that one count and anything that might go with it -- one
25 or more counts.

1 Everyone want to object to that?

2 MR. O'NEILL: Yeah. I don't want to press a
3 verdict, Your Honor.

4 THE COURT: Okay. I think have the discretion to
5 take a partial verdict and I'm going to.

6 MR. BOWE: And just to renew, we would object.

7 MR. KING: And Mr. Southerland would object also,
8 Your Honor.

9 THE COURT: Okay. Let's have the jury, please.

10 (Jury enters.)

11 THE COURT: All right. Be seated, please.

12 We know you're working very hard on this and we
13 appreciate it.

14 I am going to send you back for further
15 deliberations. We have, of course, reviewed the notes that
16 you have sent out.

17 Let me say this. What we really want you to do, if
18 you can without violating any of your individual consciences,
19 is to reach a unanimous vote on each of the three counts
20 before you. But if you come to the conclusion that you're
21 absolutely unable to do that and you can reach a unanimous
22 conclusion on any one or more of the three counts, then just
23 let us know that -- one or more of the three counts.

24 Again, I don't want to say that to discourage you
25 from reaching a unanimous verdict on all three, if that can be

1 done without violating your individual consciences. But if
2 you are convinced that you cannot, then us let us know which
3 one or more of the counts you can, if there are any, reach a
4 unanimous verdict on. So we'll send you back in with those
5 directions. Thank you very much.

6 (Jury exits.)

7 THE COURT: All right. We'll stand in recess. I
8 expect we'll hear from them shortly.

9 MR. BOWE: (Nods head affirmatively.)

10 (Recess.)

11 (Time noted: 4:05 p.m.)

12 THE CLERK: All rise.

13 THE COURT: Be seated, please.

14 Court Exhibit 9, says, "Can we find Mr. Woo
15 negligent and still award compensation to plaintiffs?"

16 Your turn, Mr. O'Neill.

17 MR. O'NEILL: Well, I think that's an easy question
18 to answer, Judge. The answer is no.

19 THE COURT: All right.

20 MR. BOWE: I would agree, Your Honor.

21 MR. KING: Yes, Your Honor. That's not a -- they're
22 not back there to find him negligent. That's not one of the
23 jury instructions.

24 THE COURT: All right. Let's have the jury.

25 (Jury enters.)

1 THE COURT: Be seated, please.

2 All right, ladies and gentlemen. We have your
3 question: "Can we find Mr. Woo negligent and still award
4 compensation to the plaintiffs?"

5 The answer to that question is no. We will ask you
6 to continue your deliberations. Thank you very much.

7 (Jury exits.)

8 THE COURT: Okay. See you soon.

9 MR. O'NEILL: Thank you, Judge.

10 (Recess.)

11 (Time noted: 5:05 p.m.)

12 THE CLERK: All rise.

13 THE COURT: Be seated, please.

14 Court Exhibit 10 is a note from the jury that says,
15 "Judge, for two and-a-half days, we have been deliberating and
16 are unable to come to a unanimous decision."

17 So to the extent there was a potential partial
18 verdict, it does not indicate that now and I don't think I can
19 request that of them, since the note does not indicate that.

20 Mr. O'Neill, you want to renew your motion?

21 MR. O'NEILL: Yes, Your Honor. We renew our motion
22 at this time.

23 THE COURT: Anyone oppose?

24 (No response.)

25 THE COURT: All right. I'm going to find that the

1 jury has been unable to reach a decision, and I hereby declare
2 a mistrial. Let's have the jury in, and I will is say a few
3 words to them. Are you available to pick a new jury on
4 Monday? That's joke. Okay.

5 Let's have the jury, please.

6 (Jury enters.)

7 THE COURT: All right. Be seated, please.

8 All right, ladies and gentlemen. We have your last
9 note that again says you've been unable to come to a unanimous
10 decision. I have, therefore, concluded you're not going to be
11 able to come a unanimous decision and I'm declaring a
12 mistrial, and we will do this case again with another jury.

13 This is not to say you didn't render great service
14 in this case. I know you worked at it extremely hard and it's
15 not an easy thing. This is not just a day off from work for
16 anybody. I know that. And we really do appreciate the fact
17 that you focused so hard on the issues and gave it all you had
18 to give it. That's all we can ask to you do.

19 So thank you very much for yourself. We appreciate
20 you having been here.

21 MR. O'NEILL: On behalf of the children, we'd like
22 to thank the jury.

23 MR. KING: We thank you.

24 MR. BOWE: (Nods head affirmatively.)

25 (Jury exits.)

1 THE COURT: All right. Thank you all. I'm sorry
2 you didn't win. I will check my calendar and I'll get some
3 days to you as soon as I can.

4 MR. O'NEILL: Do we get to see note eight, Your
5 Honor.

6 THE COURT: I don't think so, but I'll still about
7 it.

8 MR. KING: I want to do a thing that procedurally is
9 strange, but I looked at the law and I don't know exactly how
10 it works.

11 THE COURT: Let's be seated.

12 Yes, Mr. King?

13 MR. KING: Just one thing. I saw some case law that
14 says you can renew a Rule 50 after a mistrial and so just for
15 good measure, I'm renewing the Rule 50. I know that Your
16 Honor gave Mr. Woo an opportunity to respond by June 13th,
17 which is tomorrow, to a motion I had made before trial. I've
18 renewed that motion at the close of evidence, and I'm renewing
19 it now, after the mistrial.

20 THE COURT: Okay. It is denied.

21 Thank you all. We're adjourned.

22 MR. BOWE: Thank you, Your Honor.

23 (Trial concluded.)
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Court Exhibit 7	923
Court Exhibit 8	923
Court Exhibit 9	926

-	also [7] 912/4 916/18 919/14 921/7 921/10 922/13 924/7	BMC [1] 909/4 both [6] 913/18 913/25 914/5 920/3 920/18 921/6
x [2] 909/2	alternate [1] 918/24	
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12 [4] 909/7 914/16 914/17 917/13	915/20 916/10 918/9 919/10 919/19 919/20	called [1] 914/20
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2379 [1] 910/24	anybody [1] 927/16	card [1] 911/17
2644 [1] 910/24	anymore [1] 913/14	CARDOZO [1] 910/3
28th [1] 909/20	anyone [3] 915/1 918/13 926/23	case [8] 912/19 918/6 919/1 921/6 921/12 927/12 927/14 928/13
3	anything [3] 917/3 918/7 923/24	Casey [1] 911/11
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3329 [2] 909/4 911/3	appearances [3] 909/14 910/1 911/4	CAUSE [1] 909/10
4	applied [1] 919/7	CCR [1] 910/22
40 [1] 909/20	applies [1] 912/11	chambers [1] 921/17
42 [2] 918/2 918/12	apply [1] 913/5	change [1] 922/17
49 [2] 920/15 920/16	applying [1] 913/1	charge [1] 911/20
4:05 [1] 925/11	appreciate [3] 924/13 927/16 927/19	check [2] 919/5 928/2
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